In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

FRANCIS B. GEBHART, ET AL.,

Petitioners,

v.

ETHEL LOUISE BELTON, ET AL.,

Respondents.

Washington, D. C.

No. [illegible]

FRANCIS B. GEBHART, ET AL.,

Petitioners,

v.

SHIRLEY BARBARA BULAH, ET AL.,

Respondents.

December 11, 1952

WARD & PAUL

[illegible] PENNSYLVANIA AVE. N. W.

WASHINGTON, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

FRANCIS B. GEBHART, ET AL.,

Petitioners,

vs.

ETHEL LOUISE BELTON, ET AL.,

Respondents.

No. 448

FRANCIS B. GEBHART, ET AL.,

Petitioners,

vs.

SHIRLEY BARBARA BULAH, ET AL.,

Respondents.

Washington, D. C.,

December 11, 1952.

The above-entitled cause came on for oral argument at 2:27 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, and Minton.

APPEARANCES:

On behalf of the Petitioners:

H. ALBERT YOUNG, ESQ.

On behalf of the Respondents:

LOUIS L. REDDING, ESQ., and

JACK GREENBERG, ESQ.

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P R O C E E D I N G S

The Chief Justice: Case No. 448, Francis B. Gebhart, and others, versus Ethel Louise Belton, and others.

The Clerk: Counsel are present.

ARGUMENT ON BEHALF OF PETITIONERS

By Mr. Young

Mr. Young: May it please the Court, it seems that I have a Herculean task to perform in attempting to add to what has already been presented for some eight hours of argument before this Court. But there are some points which I will only touch upon briefly since it has been so ably presented by counsel in all of the other cases that preceded mine for argument.

In this case, involving the State of Delaware, a petition for writ of certiorari and supporting brief was filed on November 13th of this year.

The Delaware Supreme Court handed down its mandate on September 9, 1952, and certiorari was granted on November 24, 1952, the Court advising me that I would be permitted to file my brief not later than three weeks after argument, and I can assure the Court that the brief will be in before the three weeks are out.

Jurisdiction in this case is invoked under 28 United States Code Section 1257, paragraph 3.

The validity of the Delaware constitutional provisions and the statutes invoked was challenged by the respondents. The

pertinent provisions of the Delaware constitution and statute are as follows, Section 1, Article X, of the Constitution of the State of Delaware being as follows:

"The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public schools, unless educated by other means.

"Section 2. In addition to the income of the investments of the Public School Fund, the General Assembly shall make provision for the annual payment of not less than one hundred thousand dollars for the benefit of the free public schools which, with the income of the investments of the Public School Fund shall be equitably apportioned among the school districts of the State as the General Assembly shall provide; and the money so apportioned shall be used exclusively for the payment of teachers' salaries and for furnishing free textbooks; provided, however, that in such apportionment, no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

The statutory counterpart provides:

"The State Board of Education is authorized,

empowered, directed and required to maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this Chapter, the by-laws or rules and regulations and the policies of the State Board of Education to be carried into effect. The schools provided shall be of two kinds: those for white children and those for colored children."

The State contended that under our Constitution and statutes, segregation in the public schools was lawful and not in violation of the equal protection clause of the Fourteenth Amendment, and that if inequalities were found to exist, any judgment in favor of the plaintiffs should be limited to an injunction directing the defendants to equalize the facilities within a reasonable time.

The Delaware Court of Chancery and the Delaware Supreme Court held that these provisions insofar as they require segregation in the public schools, based on race or color, do not offend against the provisions of the Fourteenth Amendment forbidding any state to deny any citizen the equal protection of the laws, so that the Delaware Supreme Court did sustain the State's position that segregation per se is valid in the State of Delaware.

The cases of Plessy v. Ferguson, and Gong Lum v. Rice, the Delaware Supreme Court said are decisive of the question.

It is important in the approach to the question in our case, which is a very narrow one with respect to the form of the decree, if Your Honors please, that I read from portions of the opinion in order to demonstrate to this Court how the Delaware Supreme Court arrived at its decision.

On page 43 -- and I am sorry that I cannot refer to a book of, but I can assure the Court that it will be fully covered --

Justice Black: Page 43 of what?

Mr. Young: Page 43 of the opinion, which will be found in the supplementary appendix of appellees -- it is the blue covered book -- at the bottom of page 43, the Supreme Court said:

> "A detailed review of these cases is unnecessary, since we are cited to no case holding to the contrary. They establish the principle that the constitutional guarantee of equal protection of the laws does not prevent the establishment by the State of separate schools for whites and Negroes, provided that the facilities afforded by the State to the one class are substantially equal to those afforded to the other (often referred to as the 'separate-but-equal' doctrine). The question of segregation in the schools, under these authorities, is one of policy, and it is for the people of our State, through their duly chosen representatives, to determine what that policy shall be. When so determined, it must be given effect by

our courts, subject always to the rule enjoined both by the Constitution of the United States and our own statute, that substantially equal treatment must be accorded.

"The refusal of the Chancellor to enter the declaratory judgment prayed for was therefore, in our opinion, correct."

The Delaware Supreme Court, however, held that an injunction where an inequality is found to exist commanding the defendants to admit plaintiffs to the designated schools maintained for white children was required by the equal protection clause of the Fourteenth Amendment.

The asserted conflict, the Court held, of our constitutional and statutory provision with the equal protection clause of the Fourteenth Amendment was the sole basis for the judgment of the Delaware Court upholding the type of relief that was granted.

Justice Frankfurter: Mr. Attorney General, may I ask you whether I am to assume that the finding of the Chancellor on page 193a of your blue appendix, Folio 579 --

Mr. Young: What page is that?

Justice Frankfurter: 193a, Folio 579.

Mr. Young: If Your Honor please, the reason for the confusion in these things --

Justice Frankfurter: I will hand you mine.

Am I to assume that that is a finding which persisted through the decision of the Supreme Court of Delaware? I marked it.

Mr. Young: I see, Your Honor.

No, Your Honor, because the Supreme Court held that that was not -- if it was a finding, it was an irrelevant finding, and that it had -- as a matter of fact, the decision was that segregation per se is valid in the State of Delaware, and that had no relevancy to the finding or the conclusion.

Justice Frankfurter: To the finding. But that paragraph is in terms of a finding on the evidence as to what factors, whether any legal inference is to be drawn from it or not. You will notice the terms in which your Chancellor stated that on the evidence -- doesn't he say something about "On the evidence I find this is a fact"? Does that survive his modification of the decree by the Supreme Court?

Mr. Young: It does not.

Justice Frankfurter: It does not?

Mr. Young: It does not, Your Honor, and I will come to that in the course of my argument.

The Delaware Supreme Court held that the right to equal opportunity is a personal right; that the rights under the equal protection clause are personal and present, and for its authority relied on the cases about which so much was said during the course of the arguments here, the Gaines case, the

Sipuel case, and the Sweatt case.

Those cases, however, did not involve a constitutional provision of a State. Furthermore, there was no showing in those cases that equal facilities could be provided in a reasonable time.

There is quite a difference, I submit, between not being able to afford any facilities, and correcting certain disparities that exist, which would equalize the existing facilities and educational opportunities; and for that reason, I submit, that the Chancellor and the Supreme Court, which affirmed the decree of the Chancellor, were in error.

These cases, the Gaines case, the Sipuel case, and the Sweatt case, were not considered by the three-judge court in the Davis and Briggs cases as requiring any relief other than an injunction compelling the defendants to equalize the facilities, and giving them a reasonable time to do so.

Now, this case involved two school districts. One is known as the Claymont School District, and the other the Hockessin School District.

In the Claymont School District, there is one high school, the Claymont High School, for white children only. There is also a high school in the city of Wilmington, some nine miles away, the Howard High School for Negro children.

The Plaintiff Belton, fifteen years of age, and of high school age, attending the tenth grade, and living in Claymont,

was required to go to the Howard High School in the city of Wilmington.

There are about 404 pupils in the Claymont High School and there are 1274 pupils in the Howard High School.

I would like to point out that with the Howard High School there is an annex some nine blocks away known as the Carver School, which is devoted primarily to vocational study.

This particular plaintiff, who went to Howard High School took up typing and shorthand, and two afternoons a week would be required to go from Howard High School to Carver in order to take up those studies.

The plaintiffs contended that there was inequality. The State took the position that there was no inequality; that the curricula were the same or substantially the same; that the physical facilities were the same, that the teacher preparation was the same, and many other factors to show that there was equality.

We also pointed out, if the Court please, that the Carver Annex, which was some nine blocks away from the Howard School, was to be abandoned, and that there were plans for its abandonment before the suit was even started, and that there was to be a consolidation at the Howard High School for Negro students with respect to its academic studies and vocational work.

The court found that there was disparity between the two schools, and they found that the disparity existed in some items, some factors, one being the gymnasium -- not that the gymnasium at Howard High was not a good gymnasium -- it was a fine gymnasium, but that it was overcrowded, and would be overcrowded because of the number of students attending.

They found that travel, not because of distance itself made for inequality, but because the petitioner or the plaintiff had to go to Howard High, and then from Howard High on to walk the nine blocks to Carver which, we contended, would be abandoned, and the court also found that the physical education classes were larger than they should be in order to afford proper and adequate instruction.

They also found disparity with respect to the playground at Carver -- Carver, the school that we said was going to be abandoned, and which we had admitted was inadequate, but in that Carver had no playground, although Howard High in the opportunity to permit its pupils to go to a park which adjoined Howard High consisting of some ten acres, the fact that Carver had no playground was considered as one of the factors making for inequality, and, of course, it was held that the Carver building itself was wholly inadequate.

We contested these questions but, nevertheless, we showed the court that the State had embarked upon a plan and

program of improving the conditions in Howard High School, and we showed that Howard High School was going to be enlarged. We also showed that there was going to be a school built in the County, another school in Middletown for Negroes, which is not in the record, but I would like to say to the Court is about to be completed at a cost of $1,350,000, and we were going to show that the students at the Howard High School in the junior high grades were going to be transferred to another school known as the Bancroft School, which is presently occupied and attended by white children, and that will be a school primarily for Negroes, so that the tension of overcrowding will be relieved at the Howard High School.

The Court, in finding these items of disparity with respect to the Carver building, which it was not going to use, the fact that this was a building that we said we were going to abandon, and the fact that the gym was overcrowded, and the fact that there was this travel required by busses from Howard High to Carver, found that as to the allocation of public funds, there was equality of treatment; that as to the buildings proper they were the same; that as to accreditation, they were equal; that as to equipment and instruction material, they were equal; that the libraries were the same, with the library of Howard being larger; that the physical and mental health and nursing facilities at Howard, the colored school, were superior; and

the court went on to say that the other differences were too insubstantial to find -- to support a finding of inequality.

The other case had to do with an elementary school in what is known as Hockessin, School 107, is the school for colored children, a two-room school, having 44 pupils.

Number 29 is a four-room school having 111 pupils.

There are two teachers in 107; there are four teachers in 29.

In that case, travel, with respect to travel, no bus transportation was provided the plaintiff, although there was bus transportation provided for white children.

In that case it was held that 107 receives equal or greater support now, and it did receive equal and greater support at the time of the hearing, although there was evidence that prior thereto the colored school did not receive equal support, which, perhaps, made for the disparity in the maintenance and upkeep of that particular school.

Both buildings -- both are brick buildings; both are substantially constructed, so that the court in the case involving the elementary schools which have classes from the first grade to the sixth grade, held there was disparity in value, in upkeep, in exterior painting and floors, in toilet facilities, fire hazard, auditorium and custodial services.

The court then went on to say, for disparity, or was

found in the Delaware case, are such as can be readily corrected, and that the State should have been given the time, or the Board of Education should have been given the time, where there was this recognition of the "separate but equal" doctrine, in order to correct the inequalities that exist.

The defendants show the court that there was under way in the City of Wilmington, as I stated before, a far-reaching program for the improvement of facilities in the Negro schools.

As I said, the Carver school was to be abandoned. The junior high school pupils at the Howard school, that is, the Negro high school, were to be transferred to the Bancroft school so as to relieve it from crowding, and the Howard school was to be enlarged.

There were to be new shops; the laboratories would be added, and the Bancroft school is to be a completely modern junior high school.

All of these things were to be equalized, and will be equalized by September of 1953; and the Middletown High School, as I indicated before, will be completed at a cost of $1,350,000.

As to the form of the decree, the court enjoined the defendants from denying plaintiffs admittance to the two schools, retaining --

Justice Reed: Your objection here, Mr. Attorney General, is as to the fitness of the decree with respect to immediacy?

Mr. Young: Correct.

Justice Reed: Your contention is that it should wait until later?

Mr. Young: That is correct.

Justice Reed: Will you address yourself as to why we should overrrule the findings of the Chancellor?

Mr. Young: Yes.

The contention is that based on the ground of the Chancellor and the Delaware Supreme Court, in affirming the Chancellor, did not interpret the cases upon which they relie... the Sipuel case and the Gaines case and the Sweatt case, in making a finding that unless they grant immediate relief it would be in violation of the equal-protection clause of the Fourteenth Amendment.

May I refer to the portion of the opinion of the Supreme Court, on page 63:

> "In affirming the Chancellor's order, we have not overlooked the fact that the defendants may at some future date apply for a modification of the order if, in their judgment, the inequalities as between the Howard and Claymont schools, or as between School No. 29 and School No. 107 have then been removed. As to Howard, the defendants, as above stated, assert that when the

Howard-Carver changes are completed, equality will exist. The Chancellor apparently thought the contrary. We do not concur in his conclusion, since we think that that question, if it arises, is one which will have to be decided in the light of the facts then existing and applicable principles of the law.

The Chancellor properly reserved jurisdiction of the cause to grant such further and additional relief as might appear appropriate in the future, and we construe this reservation to be a general reservation to any party to the cause to make an application to modify the order in any respect if and when changed conditions are believed to warrant such action."

Justice Frankfurter: Has this litigation had any effect upon other school districts in your State, Mr. Attorney General?

Mr. Young: Well, I must speak outside the record.

Justice Frankfurter: Yes, that is my question.

Mr. Young: As a matter of fact, that is the reason I am here now, because of the terrific impact upon the rest of the State by this decision.

Justice Frankfurter: Would not each district, whatever the units may be, call for a separate assessment of the conditions in that district, the way your court did here?

Mr. Young: What it would mean, Your Honor, is that each

case might involve litigation.

Justice Frankfurter: That is right.

Mr. Young: And it would also prevent, perhaps, the Legislators from voting for particular allotments for particular school districts, not knowing whether they can maintain the separate-but-equal phase of it or not.

Justice Frankfurter: I may be wrong, but I should assume that it is almost inevitable that the conditions in the various districts would not be identical, and therefore differentiation would be almost inevitable, and the claim that the two colored and white schools are not the same would almost inevitably be made, and it would have to be decided with proper reference to each set of circumstances.

Mr. Young: I absolutely agree with you, sir; I absolutely agree, but what I contend is this: that in a State which recognizes the separate-but-equal doctrine, where inequalities exist, and it can be shown that those inequalities can be corrected, let us say overnight or within a week, to make an order that the Negro children shall be admitted into the white school is indirectly saying -- abolishing segregation.

Justice Frankfurter: Am I to infer that you think that the thrust of the decision of the Supreme Court is that if inequality is shown, and this whole litigation is unlike the litigation in all the other records -- that if inequality

is shown, a decree must be issued at once, although it might be corrected overnight?

Mr. Young: That is correct. That seems to be my feeling about it and my understanding of that opinion -- that as long as inequality --

Justice Frankfurter: In other words, you are arguing on the assumption that that is what the opinion of your Supreme Court means?

Mr. Young: Exactly.

Justice Reed: How can you say that when you yourself, as I understood it, said that it would not be corrected until September 1, 1953?

Mr. Young: That, Your Honor, went as far as the Claymont school, the high school,was concerned, where we said a new building had to be constructed.

But in the Hockessin situation, a two-room school, where we could, perhaps, within ten days put on an additional room or improve the toilet facilities or those other things that Your Honor will note in the opinion, we feel that they can be corrected with dispatch.

Justice Reed: So it is a problem of weighing the time it would take to make the corrections?

Mr. Young: That is correct.

Justice Reed: Even in the one that is not to be ready [illegible] 1953?

Mr. Young: That is correct.

Justice Reed: You take the position that that is an adequate time?

Mr. Young: We think that is a reasonable time, as long as we have shown --

Justice Reed: As long as there are facilities and institutions afforded?

Mr. Young: Precisely; and as long as it is shown that we are willing and able to do it, and that there is every reason to believe that it will be done, the separate-but-equal doctrine being recognized by the court -- there should be no immediacy for the entrance of those Negro pupils into the white schools.

Justice Reed: Has litigation of this type reached your Supreme Court in the last five or ten years?

Mr. Young: This is the first in the history of the State.

Justice Jackson: Do I understand that the inequality is largely a matter of overcrowding, relative overcrowding?

Mr. Young: I want to differentiate between the two cases.

Justice Jackson: Yes.

Mr. Young: In the Claymont High School they claimed it was due to overcrowding, not in the school entirely, but only in physical education classes.

Justice Jackson: Has there been a shift of population? That is, have you had a migration which has occurred since the war, with war industries?

Mr. Young: Well, we have some, yes.

Justice Jackson: You have some.

Mr. Young: But I do not know whether we can attribute too much to that. But the fact is that the Howard High School has both the junior and the senior pupils there, and the fact that we are taking those pupils away from the Howard High School into this other school will certainly correct this situation.

But apparently the Delaware Supreme Court seemed to term this inequality only as to the overcrowding in a particular class, which did not make for proper instruction in physical education, but it seemed to hold that as to all other classes the difference in size between twenty-five pupils in white schools, and thirty or thirty-one or thirty-two in classes in the colored schools did not make for inequality so as to affect educational opportunity or instruction.

The State contends that where disparity exists under the equal-protection clause of the Fourteenth Amendment, the rights of Negro children are protected by a decree compelling school administrators to equalize the facilities in the segregated schools involved where a State constitutional

provision makes mandatory the maintenance of separate schools for white and colored children, and where school administrators have reasonably shown that the existing inequality can and probably will be corrected within a reasonable time.

So the Court of Chancery, of course, sat as a court of equity, and the form of the decree, we contend, violates the fundamental equitable principles as laid down in Eccles v. Peoples Bank.

In that case the court said:

"It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief."

There was no showing that the State could not equalize or that it was unwilling to equalize, and the effect of the decree is demoralizing to the Negro pupils as well as to the white pupils, to the teachers, to the State Board of Education.

There is no permanency, there is no stability, as one of the counsel mentioned during the course of the argument in the Virginia case.

The decree in its present form, which says that the Negro children shall be permitted to go to the white school and that the Board of Education may come in next week, next month, and modify the decree would result in shunting those Negro children back and forth.

There would be no stability, there would be no permanency. I would rather if the court had said that segretation per se is bad; "Let the Negro children go to the white schools."

(Whereupon, a luncheon recess was taken.)

AFTER RECESS

Mr. Young: Mr. Justice Frankfurter, you asked me whether the Chancellor's finding on the evidence that segregation produces detrimental results so far as educational opportunities are concerned, if it is applied, and I call the Court's attention to the opinion of the Supreme Court of Delaware on page 44, beginning with the third paragraph:

> "It is said that the uncontradicted evidence that was adduced by the plaintiffs shows that State-imposed segregation in the public schools and equality of educational opportunity are inherently incompatible, and that the Chancellor so held. The Chancellor indeed found on the evidence that segregation itself results in the Negro's receiving inferior educational opportunities, and expressed the opinion that the 'separate but equal' doctrine should be rejected. He nevertheless recognized that his finding was immaterial to the legal conclusion drawn from the authorities above cited. We agree that it is immaterial, and hence see no occasion to review it."

Justice Frankfurter: Therefore, it is not before us.

Mr. Young: That is right.

Justice Black: But does that necessarily follow? They did not set it aside, so that you have a finding of your Chancellor so far as segregation is concerned in Delaware that the result of it is the affording of an inferior opportunity of education and your Supreme Court says that nevertheless the Supreme Court of the United States, in effect, has held that that can never be a constitutional ground.

Mr. Young: So did the Chancellor, Your Honor.

Justice Black: But you still have your finding that, so far as Delaware is concerned -- and I presume he was not looking at evidence anywhere but Delaware, that the system of segregation there, even though the facilities, physical facilities, are equal, results in inferior education for them.

Mr. Young: He did so state.

Justice Black: We have that finding without its being set aside.

Mr. Young: Well, I think we have it, in effect, set aside when the Supreme Court says that he considered it immaterial to the conclusion in his case and the decision in his case.

Justice Black: That is right. He considered it immaterial, but nevertheless are we not faced with this situation: Do you conceive that segregation might be held on evidence in some places to supply equal opportunities for

education, while in others it might be held that the situation wassuch that it gave an inferior opportunity for education?

Mr. Young: Depending on the facilities offered, and the educational opportunities.

Justice Black: I mean, assuming that the facilities are the same --

Mr. Young: Yes.

Justice Black: -- do you conceive that it is impossible for segregation in one place to result in an equality of opportunity of education, while in another it might result in inequality of opportunity of education?

Mr. Young: No, I cannot conceive of that myself.

Now, it may be that --

Justice Black: There might be many things involved, might there not?

Mr. Young: That is true, but I am not prepared to say whether, all factors being equal, mere segregation of and by itself will bring about inferiority so far as educational opportunities are concerned.

Justice Black: Well, assuming that you had facts, and that your court found on the facts that in Delaware, where your two schools functioned, and with the general conditions of education in Delaware and the relationship between the races and all of that was such that even though the facilities

were identical -- physical facilities -- nevertheless, in Delaware, the results of segregation were to give an unequal opportunity of education to the colored people.

Would you say that, assuming that finding on local facts, and it is accepted, that the separate but equal doctrine would not make it necessary to state that?

Mr. Young: I would not, If Your Honor please, under our Constitution and its statutory counterpart -- we are required to maintain separate schools for white and colored as long as we afford them equal opportunities and equal facilities and I think that that would merely be an oblique way of striking down segregation, and desegregating schools.

Justice Black: If you assume that the facts are correctly found. Suppose I asked you to assume that the Court found those facts, and assume that he is right, and you had no way to overturn them. He would say that conditions in Delaware -- give consideration on the facts -- to see whether or not the colored people get an equal opportunity for education.

Now, I find that they do so far as the physical results are concerned, but I am led to the conclusion from the evidence and find from the evidence that they do not because the relationship that exists here, and by reason of the manner of going to school, and the mixture in other places, and so forth, I find that the effect on the children is that they get an inferior opportunity for education. Would you say that that would still not bring them within the separate but equal doctrine?

Mr. Young: I would, Your Honor. I would because I say that would be violative of the equal protection clause of the

Fourteenth Amendment, and would also be violative of our own constitutional provisions, because we are assuming now facilities being equal, educational opportunities being equal; I would like to say I do not know what evidence Your Honor is referring to that the chancellor could rely on other than the sociologists and anthropologists and psychologists.

Justice Black: I just read the findings, and I asked you the question at the beginning of these arguments, you may remember.

Mr. Young: I remember.

Justice Black: About the difference in findings, and I wondered -- both sides seem to be relying on the findings so much, and I wondered if the assumption we must make from that is that both sides believe that it could be found in one state and one locality by reason of a different situation that opportunities were unequal, even though the facilities were equal, while in another that would not be the case.

Mr. Young: I do not subscribe to that, Your Honor.

Justice Frankfurter: Mr. Attorney General, since I got you into this trouble, perhaps I might help straighten out the way the matter lies in my mind.

I had not read that sentence to which you called attention in the opinion of the Supreme Court. I think for myself this situation is very different from the Kansas situation.

In the Kansas situation we have a finding of fact similar

to the finding made by your Chancellor, and the court said that finding does not bear on the legal question, namely, that the state has power to segregate, no matter what the psychological consequences may be, and that is what your Chancellor found.

As I understand it myself, when your Supreme Court came to review the decision of the Chancellor, it said that inasmuch as his finding of fact is irrelevant, it was not going to review it. Therefore, we have a finding of an inferior court specifically not reviewed by the highest court of the state.

The chancellor found that on his appraisal of the evidence. Insofar as I am concerned it may well be that your Supreme Court might not have reached that conclusion, and might not have weighed the evidence that the Chancellor did and, therefore, we have not got, for myself in this case, what we have in the Kansas case, a finding of fact which binds us, because for all I know your Supreme Court might have disagreed with your chancellor, and then we would be in a position where he highest court said that the evidence does not yield to the conclusions that the Chancellor thought it yielded.

Mr. Young: That is precisely the point, Your Honor, and what is more, a review of the opinion would show that the Delaware Supreme Court did not agree with many things that the Chancellor said in his opinion in the lower court.

Justice Frankfurter: Yes. The legal position that you take is on the assumption that was presented by the Kansas case.

I think that your record presents a different set of facts.

Mr. Young: Exactly. There was no finding of fact that was considered at all. It was considered immaterial to the issue.

Justice Frankfurter: A very powerful finding by the chancellor.

Mr. Young: Oh, yes.

Justice Black: I do not like to interrupt again, but taking that as true, if we assume and admit such a finding is relevant, you would be in a situation of having a finding by your chancellor which is relevant, which might cause the case to turn one way or the other, which has not been reviewed by your highest court.

Mr. Young: That is right. But there is one thing I want to make plain: That notwithstanding that finding, and notwithstanding the fact that it was disregarded by the Supreme Court, I nevertheless address Your Honor's attention to the point that the shape of the decree, in any event, was not a proper decree under the circumstances, even if that were so.

Let us assume that were so, and it just desegregated the schools; nevertheless, the form of the decree being in conflict with the other jurisdiction, was not a proper decree, taking into account the needs and the relief to be granted, and the public interest involved.

This Court, as I contend, is not exercising -- it was not

a question of abuse of discretion, and it is not a matter of administration nor a matter of enforcing the injunction.

Both courts, my position is, said that under and only by reason of the Fourteenth Amendment was it justified to make the kind of decree it did.

The decree in the court below, while asserting that the plaintiffs were entitled to relief, made no attempt to assess the effect of its decree on the defendants, on the children and their parents, both white and colored, in the school district affected.

No consideration was given to the ability of the defendants to equalize the facilities involved within a reasonable time; no consideration was given to the effect of a possible later decree based on changing circumstances; no consideration was given to the effect of the decree on the school administrators who would be faced with the problem of determining how and where to enroll children in the various school districts in the state.

No consideration was given to the effect of the decree on the public, generally, and on the legislature in planning for the future, in allocating funds for the maintenance and construction of school facilities.

The court below stated that the plaintiffs' rights were personal and present, and this does not necessarily mean that they are entitled immediately to admittance to the schools maintained for white children only.

The plaintiffs' rights are given full consideration when the court orders the defendants to proceed forthwith to make the facilities of the respective schools equal.

In this case, too, I am grateful to the Attorney General for his brief, and in his amicus curiae brief. On page 28 I would like the Court to take note of what he said:

"If, in any of the present cases, the Court should hold that to compel colored children to attend 'separate but equal' public schools is unconstitutional, the Government would suggest that in shaping the relief the Court should take into account the need, not only for prompt vindication of the constitutional rights violated, but also for orderly and reasonable solution of the vexing problems which may arise in eliminating such segregation. The public interest plainly would be served by avoidance of needless dislocation and confusion in the administration of the school systems affected. It must be recognized that racial segregation in public schools has been in effect in many states for a long time. Its roots go deep in the history and traditions of these states. The practical difficulties which may be met in making progressive adjustments to a non-segregated system cannot be ignored or minimized."

Justice Reed: I asked a question similar to this before. Why do you contend that that is a problem here? Is it a violation

of the Federal law or a violation of the Federal Constitution that the Delaware Supreme Court has acted somewhat precipitately, from your point of view?

Mr. Young: It is because, Your Honor, we contend that the Supreme Court, affirming the Chancellor who acted in this matter, in shaping the form of the decree, said that he was compelled to make that kind of a decree under the equal protection clause of the Fourteenth Amendment. It was not a question of exercising discretion; in fact, it negated that proposition.

If, for example, he would reach the same result by saying that he is exercising his discretion, perhaps we would have another matter. But he said he was compelled to issue that kind of a decree under the equal protection clause of the Fourteenth Amendment.

Justice Douglas: Is that because the right is personal?

Mr. Young: Because the right is personal, and depending upon the cases of Sweatt and the Gaines case and, of course, we differentiate between those cases, cases where there was no facility, there was no expectancy of any facility within a reasonable time, as compared with a case where there is the ability and the willingness to equalize.

Justice Reed: It is difficult for me to grasp what the State court of Delaware was saying when it said it was not acting within its discretion.

Mr. Young: Well, the Supreme Court pointed out in its

opinion and stated that they were relying solely --

Justice Reed: It is on page 44.

Mr. Young: On page 57 the court cast aside -- the Delaware Supreme Court -- two preliminary matters upon which, perhaps, the injunction could have been or the decree could have been, handed down, but said:

"But we prefer to rest our decision upon another ground. With deference to the decisions in the Briggs and Davis cases, which we have carefully examined and considered, we cannot reconcile the denial of prompt relief with the pronouncements of the Supreme Court of the United States. If, as we have seen, the right to equal protection of the laws is a 'personal and present' one, how can these plaintiffs be denied such relief as is now available? The commendable effort of the state to remedy the situation serves to emphasize the importance of the present inequalities."

The Chief Justice: I think you will find some language in the Sipuel case, if I remember rightly, about "personal and present."

Mr. Young: Yes.

The Chief Justice: That was the admission into the school in Oklahoma. I think that language is in the Sipuel case.

Mr. Young: That is right.

The Chief Justice: I mean "personal and present."

Mr. Young: Well, there it was proper, I state, because there is quite a distinction between higher education and facilities that can or cannot be offered on a higher educational level as compared with the common school level; and the court -- our contention is that the lower court, the inferior court, the Court of Chancery -- was in error when it thought that it was compelled to issue the kind of decree it did without giving any regard to the public interest and to the parties involved.

Justice Reed: Your court says in the opinion:

"To require the plaintiffs to wait another year" - I am reading at page 58 --

Mr. Young: Yes.

Justice Reed: (Continuing) "under present conditions would be in effect partially to deny them that to which which we have held they are entitled. It is possible that a case might occur in which completion of equalization of facilities might be so imminent as to justify a different result, but we do not pass on that question because it was not presented."

Whether that is discretion -- your position is that they are bound under the Sipuel case to give immediate relief; they thought they were bound to give immediate --

Mr. Young: Yes, they thought they were bound.

Justice Reed: To give immediate relief.

Mr. Young: Yes, that is correct.

In the light of what I have read from the amicus curiae brief, when it was urged that the Court should be slow in desegregating even where segregation per se was held to be invalid, our contention is that the fact that it is even more serious where the separate but equal doctrine is held to be valid, and where it is recognized that the state, upon a showing that any existing inequality relating to facilities and educational opportunities are capable of being corrected within a reasonable time, for a court to compel the immediate amalgamation of Negroes and whites in the same school, and then later upon a showing of equalization again separate the Negro children from the white school.

A decree requiring the defendants to equalize the facilities within a reasonable time would give the plaintiffs relief as quickly as practicable, consistent with an orderly administration of the school system and a specific adjustment of inequalities where such inequalities have been found to exist in the past.

The same situation occurred in the Virginia case and also in the South Carolina case, perhaps not with the finding that Your Honors find to exist in the opinion of the chancellor in the lower court, but I believe that the language of --

The Chief Justice: The language can be found in the Virginia case, can it not?

Mr. Young: Not that particular finding that segregation

of and by itself under the evidence is harmful. I think that they did --

The Chief Justice: They had findings there that it was not equal.

Mr. Young: That it was not equal, that is correct; and I believe there was some comment, as I recall, that whether it does harm or does not do harm is not for the Court to determine. But this is what Judge Parker had to say in disposing of the case, the South Carolina case:

> "It is argued that, because the school facilities furnished Negroes in District No. 22 are inferior to those furnished white persons, we should enjoin segregation rather than direct the equalizing of conditions. Inasmuch as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. As a court of equity, we should exercise our power to assure to plaintiffs the equality of treatment to which they are entitled with due regard to the legislative policy of the state. In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white

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persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort."

The Court, as it was said in the Brigge case, should not use its power to abolish segregation in a state where it is required by the constitution and laws of the state if the equality demanded by the Constitution can be attained otherwise.

This much, the court went on to say, is demanded by the spirit of comity which must prevail in the relationship between the agencies of the Federal Government and the state if our constitutional system is to endure.

What we ask in this case is that the Delaware Supreme Court's judgment be reversed and that the Delaware Supreme Court be instructed that affording reasonable time for the board of education to correct inequalities capable of being corrected, as we have shown, is not in violation of the Fourteenth Amendment.

Justice Frankfurter: Mr. Attorney General, may I trouble you again. Has the Supreme Court, your Supreme Court, in terms, not as a necessary consequence of what it has decided, but has your Supreme Court in terms, taken the position that if the chancellor finds inequality then the immediate opening of the doors of schools of whites who have no segregation in schools is a legal compulsion?

Mr. Young: That is, we contend, the position the Supreme Court took.

Justice Frankfurter: Has it taken that in terms? Here is what troubles me. It is asking a great deal of this Court, for one-ninth of this Court, to overrule the judgment of the chancellor, affirmed by the Supreme Court of the state, that the equity of the situation requires the decree that they entered.

If they base that on their interpretation of what the decisions of this Court require, then it was not the Chancellor's exercise of discretion, but it was a result cursed by the requirement that they must follow the decisions of the Court.

As I read their opinions, they did not say that in terms, did they?

Mr. Young: No, but the general mandate, it would seem to me, the blanket mandate, in affirming the judgment of the court of Chancery or the Chancellor --

Justice Frankfurter: Did the Chancellor think that was the thing to do?

Mr. Young: He thought so, yes.

Justice Frankfurter: That as soon as inequality is shown, then at once there must be --

Mr. Young: That is right.

Justice Frankfurter: How could he? We did not do that in one of the cases.

Mr. Young: We tried to point out to the Chancellor that he was wrong, and we tried to point out to the Chancellor that that was not so.

Justice Frankfurter: The question is whether he was wrong or what rule of law did he apply. If he said that in this situation, considering the circumstances in Delaware, your county or school district, or he may not have been explicit about it -- that is one thing. If he says that the Supreme Court demands, "and I am an obedient judge," that is another thing.

Mr. Young: He said where there is an injury, as he found such to be here, then the injury should be redressed immediately.

Justice Frankfurter: Well, that may be his view as an equity judge.

Mr. Young: But he based it on the equal protection clause of the Fourteenth Amendment.

Justice Frankfurter: If I may say so, a chancellor who shows as much competence as this opinion shows, probably can read the opinions of this Court with understanding.

Mr. Young: There is no question about the Chancellor's competency, Your Honor.

Justice Frankfurter: If I may say so, it was an unusual opinion, as opinions go.

Mr. Young: May I read from just the opinion of the chancellor on page 203, at the bottom of the page:

"Just what is the effect of such a finding of a violation of the Constitution, as has here been made. It is true that in such a situation some courts have merely directed the appropriate state officials to equalize facilities. I do not believe that such is the relief warranted by a finding that the United States Constitution has been violated. It seems to me that when a plaintiff shows to the satisfaction of a court that there is an existing and continuing violation of the 'separate but equal' doctrine, he is entitled to have made available to him the State facilities which have been shown to be superior. To do otherwise is to say to such a plaintiff: 'Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated.'"

Now, Judge Parker had that problem before him in the South Carolina case, and the same problem was there in the Virginia case. But is it a violation that is going to continue upon a showing that we, the state, are able and willing to correct the existing inequalities between the two races?

Justice Frankfurter: Suppose your Supreme Court had said that "It is our view that when a violation of the Constitution is shown, that is such an overriding equity that we regard the inconvenience or the difficulties to the state as subordinate to that overriding equity." That would be a view of equity, the

balancing of considerations by the local court, and not at all derived from the necessities of the Fourteenth Amendment?

Mr. Young: I agree with Your Honor.

Justice Frankfurter: I was wondering whether that is not really implicit in these decisions?

Mr. Young: I do not believe so. I think that they were fully cognizant of the equal protection clause of the Fourteenth Amendment, and that they were aware of the South Carolina case at the time, the Virginia case, and that the leading cases, the Sweatt case and, of course, the Gaines case, and it was on that basis that they felt that they were compelled to make the kind of order --

Justice Frankfurter: Automatically because there was a violation of the Fourteenth Amendment, and the Fourteenth Amendment requires automatic redress, that is your view of it?

Mr. Young: That is right, precisely. That is our view, and I think it is borne out by a reading of the two opinions in the court of chancery and in the Delaware Supreme Court.

Justice Reed: Mr. Attorney General, I call your attention to page 204(a), as I understand it, of the chancellor's opinion, and towards the bottom he says, "If it be a matter of discretion, I reach the same conclusion."

Mr. Young: Well, I think that is the language in the opinion, but it is clear that the decision rested --

Justice Reed: He thought to the contrary, too. He also

said that if it is a matter of discretion "I reach the same conclusion."

Mr. Young: But he did reach the conclusion upon the basis and the interpretation of the equal protection clause of the Fourteenth Amendment, and that is the way the Delaware Supreme Court found that he ruled, and thought that it was proper because it was a matter of compulsion where there is such a finding.

I want to say, of course, there was much more that I would like to have brought to the Court's attention. I know it would be impossible for me to review the cases on the question of segregation per se that were so ably presented by my distinguished colleagues.

The Chief Justice: In addition to that, your time has expired?

Mr. Young: That is true. Is it at an end now?

The Chief Justice: Yes.

Mr. Young: Thank you.

ARGUMENT ON BEHALF OF RESPONDENTS

By Mr. Redding

Mr. Redding: May it please the Court, in this fifth and last case before the Court on this subject, the fundamental question is still the same as in the four preceding cases, namely, what rights has the individual to protection against arbitrary action by Government?

In four cases, including the Delaware case, the government involved is the state government; in the fifth case, the government involved is the Federal Government.

This case differs from the other cases in that the persons who were originally plaintiffs appear here not as appellants but as respondents.

Judgment in the trial court was rendered for the persons who were originally plaintiffs, and that judgment, as well as a finding of fact that there was substantial inequality in facilities, was affirmed by the state Supreme Court.

Now, that affirmance was not merely a formal affirmance. The state Supreme Court concluded that because a constitutional question was involved, that is, a question involving the constitution of the state of Delaware was involved, it had a right to completely disregard the findings of fact of the chancellor and make its own independent findings of fact, and it did so, and it sustained the chancellor's findings of fact that there was substantial inequality in physical facilities.

The chancellor made a second finding of fact. He made a finding of fact which, in language, is something like this -- and I think, perhaps, I had better refer to the exact language:

> "I conclude from the testimony that in our Delaware society, state-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior

to those available to white children otherwise similarly situated."

Now, the respondents here say, first of all, just as has been said in the four preceding cases, that classification on the basis of race to determine what educational facilities may be enjoyed, is arbitrary and unreasonable, and because it is arbitrary and unreasonable, it is unconstitutional.

We say that such a classification has no relationship to the education of a state's citizens.

Now, there has been some discussion arising, I think in part, from questions from your Honors as to the basis for the type of legislation that is here under attack.

I can not answer what the basis for this type of legislation in other states was, but I should like to indicate what I think the basis was in Delaware.

Delaware has never, by the normal process of ratification, ratified the Fourteenth Amendment. The only ratification of the Fourteenth Amendment which has occurred in Delaware, is a ratification by implication from judicial action.

When the Fourteenth Amendment was being circulated among the states for ratification, the Delaware Legislature, in joint session, concurred in a joint resolution, the words of which I shall read:

> "Whereas, this General Assembly believes the adoption of the said proposed amendment to the Constitution would have a tendency to destroy the rights of the states in their sovereign capacity as states, would be an attempt to establish an equality not sanctioned by the laws of nature or of God," therefore they refused to ratify.

Now, this is not an isolated action. That action was taken in March of 1869, and it is found recorded in 13 Laws of

This is not an isolated action.

The Legislature took the same action with respect to the Fifteenth Amendment. In language which is as follows, it stated:

"It is resolved that the members of this General Assembly do hereby declare their unqualified disapproval of said amendment to the Constitution of the United States, and hereby refuse to adopt and ratify the same."

I say it is not isolated, and I refer to still another resolution, if your Honors willi indulge me. This resolution was unanimously adopted by a joint session of the Delaware Legislature, and I think its language will be self-explanatory:

"Resolved that the members of this General Assembly do hereby declare uncompromising opposition to a proposed act of Congress introduced by the Honorable Charles Sumner at the last session and now on file in the Senate of the United States known as the Supplemental Civil Rights bill, and all other measures intended or calculated to equalize the Negro race with the white race, politically or socially, and especially do they proclaim unceasing opposition to making Negroes eligible to public offices, to sit on juries and to their admission into public schools where white children attend, to their admission on terms of equality with white people in churches, public

conveyances, places of amusement or hotels, and to any and every measure designed or having the effect to promote the equality of the Negro with the white men in any of the relations of life."

We say, sirs, that that is the background of this legislation.

However, Delaware did not include in its State Constitution a requirement that there be separation of Negroes and whites in public schools until 1897, the year after this Court decided Plessy v. Ferguson.

Apparently, the Delaware Legislature, which has the amendment of the Delaware Constitution -- it was amended by two successive Legislatures -- apparently the Delaware Legislature felt that there was warrant in Plessy v. Ferguson for a so-called separate but equal doctrine.

Now, we think that these resolutions indicate that this separation of the Negro and white in public schools was not based on any rational consideration.

At the trial of the case evidence was introduced further to show that such legislation was not based on any rational or reasonable grounds.

I should like the indulgence of the Court to call attention to this testimony at page 122 of the appendix of the appellees, plaintiffs below.

Dr. Otto Klineberg, a professor of psychology at Columbia

University, was testifying. He was asked this question --

Justice Reed: What was the page, please?

Mr. Redding: I am sorry, sir, page 122 of the thick blue book.

"Dr. Klineberg, are there differences in inborn intellectual capacity among individuals which are determined by whether an individual is Negro or white?

"A. No. There are, of course, differences in intellectual capacity, but we have no scientific evidence that those differences are determined in any way by the racial origin of the individual."

We think that completely removes any possibility of a contention that this legislation today, with the advances in scientific knowledge about the measurement of mental capacities of human beings today, could have any rational basis.

Now, the Delaware statute provides for separate but equal education for Negroes and whites. The form of the statute itself predetermined the nature of the action, that is, those plaintiffs felt that they were required to show that there was not equality although there was separation, and they attempted to do it on two bases: They showed inequality of physical facilities, and they got a finding of fact from the chancellor which was sustained by the Supreme Court on that, and then they attempted to show inequality flowing from the harm done by segregation on the individual student.

I might say that 12 expert witnesses testified with respect to this second aspect of inequality.

I should like to call the attention of the Court to just a small portion of that testimony. I should like to call the Court's attention to the testimony of a witness whom the chancellor characterized in his opinion as one of America's foremost psychiatrists. This witness was not testifying merely from abstractions of scientific knowledge. This witness had examined, among other Delawareans, some of the respondents in this case and, as a result of his learning and as a result of this examination, this witness testified as follows, at page 76 of this same book, which is the transcript of the testimony. Dr. Fredric Wertham testified:

> "Now, the fact of segregation in public and high school creates in the mind of the child an unsolvable conflict, an unsolvable emotional conflict, and I would say an inevitable conflict -- it is inevitable that it cause such a conflict. This conflict is, in the child's mind, what a foreign body is in the child's body."

Further, Dr. Wertham testified that segregation, state-imposed segregation, created an important inequality in educational opportunities for the various reasons. He said:

> "Now, of course, these facts that I have mentioned are not caused only by the school segregation, but the school segregation is important, of paramount importance,

for a number of reasons."

Justice Burton: Where is that?

Mr. Redding: This, I am sorry, your Honor, is at page 86 of this same transcript of testimony. He says:

"It is of paramount importance for a number of reasons.

"In the first place, it is absolutely clear cut."

Secondly, he says, the state does it; thirdly, it is not just the discrimination, it is discrimination of very long duration; it is continuous; and fourth, it is bound up with the whole educational process.

Now, sirs, I say that the Chancellor's finding of fact with respect to the harm done in Delaware society by state-imposed segregation on the minds of these children is based on that testimony.

Some discussion has been had as to what the Supreme Court of Delaware did with that finding of the Chancellor. It is our view that the Supreme Court did not reject that finding. It is our view that that finding survives, and because we have that view, and because the Supreme Court, in our view, did not give legal effectuation to a finding of fact made by the trial court, we ask that this Court give legal effectuation to such a finding.

Justice Frankfurter: Aren't you really asking that the decree below be affirmed?

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Mr. Redding: We ask, of course, that the decree below be affirmed, but we ask that it be affirmed not merely for the reason given by the Supreme Court of Delaware, but for other considerations which this Court has taken into account in, for example, the Sipuel case and the McLaurin case.

In those cases this Court did take into account factors like the isolation of the student from other students. The Delaware Supreme Court did not take that into account, and in affirming the opinion of the Delaware Supreme Court, we respectfully ask that this Court take those factors into account and grant a judgment of affirmance which will indicate that segregation in and of itself inflicts inequalities of educational opportunities on the respondents here. So that no matter what attempt to equalize facilities may be made by the Attorney General of the State of Delaware, there will still be inequality of educational opportunity which the State is not correcting.

We think that in the Sweatt case --

Justice Frankfurter: If we jus' affirmed this decree below without an opinion, that would be an end of the matter, and the plaintiffs in this case would get all they asked, would they not?

Mr. Redding: No, sir.

Justice Frankfurter: They would be admitted into the school into which they wanted to be admitted.

Mr. Redding: They ask for the equality of educational opportunity.

Justice Frankfurter: That is what they would get if the decree was affirmed.

Mr. Redding: They would get it, sir, but they would get it under the shadow of the threat of the Attorney General that the moment he has shown to the court that facilities are equalized they would then be ejected from the schools.

The Chief Justice: Was it the threat of the Attorney General or was that the condition stated by the Court?

Mr. Redding: Well, the Attorney General now threatens that, sir.

The Chief Justice: I say though --

Mr. Redding: I say that is the explanation of his appearance here.

The Chief Justice: (Continuing) -- isn't that what the court said?

Mr. Redding: Yes, the court said that.

The Chief Justice: And he held that it would be contingent, and motions might be made if conditions were changed.

Mr. Redding: We think that --

The Chief Justice: Isn't that what the court said?

Mr. Redding: That is correct, sir.

Justice Frankfurter: Did the court say that they would exclude those children if new arrangements were made? Did the

court say what they would do if in the future an application were made to deal with this decree? They simply left the decree open. Almost every decree in equity is left open.

Mr. Redding: That is correct, sir. But we have no reason to believe that the court at that time will not take the same position with respect to its limitation that it took originally.

Justice Frankfurter: Mr. Redding, we have had cases where we had to dismiss a case as moot because the child had gone through the education, a case from New Jersey, and it was a case in a totally different field -- so that by the time there may be a new threat, these boys and girls might be in various universities of the country.

Mr. Redding: We feel, sir, that the decree should be affirmed.

ARGUMENT IN BEHALF OF RESPONDENTS

By Mr. Greenberg

Mr. Greenberg: If it please the Court, we are seeking affirmance of the judgment below. In addition to the reasons submitted by Mr. Redding, which, we submit, will permanently settle respondents' right to the relief which they sought, and settle on the basis of the really important factors present in this case, we submit that the judgment rendered below should at least be affirmed for the reasons given by the court below.

The court below found that the State was offering education to respondents inferior to education offered white children similarly situated.

The petitioners, on page 4 of their petition for certiorari, expressly disclaim any challenge to this finding of inequality.

To give the Court an idea of the degree of the more

measurable inequalities present in this case, I had merely intended to mention a few of them, but since the Attorney General had taken them up in detail, I should like to, for a moment, go through our brief where they are listed on pages 27 through 41, and outline them rapidly so that the Court will have an idea of the severe degree of the inequality.

There is travel, and the significance of travel, as testified to by a psychologist, who indicated that travel has important consequences for the learning process, that it induces fatigue and irritability and takes up valuable portions of the child's time when he could be engaged in self-initiated activity, that is very important to the learning process.

There were inequalities in sites and buildings and inequalities in teacher preparation and there was inequality in teacher load, which the Attorney General did not bring out.

We contended there were inequalities in curricula and extracurricular activities; there was no finding that these were equal, but we submit, and the Supreme Court of Delaware found that, perhaps, they were de minimis, and nothing to be taken into account in a case of this sort, and it is our contention, concerning inequalities of, perhaps, this small nature, that a child should not be submitted to them merely

because of his race.

There were inequalities in the elementary school case in sites and buildings, which the Attorney General brought out, in instructional materials and accessories, which the Attorney General brought out; there were inequalities in relative expenditures for schools 29 and 107, which I do not believe were brought out; and, very important, there were inequalities in teaching in the cases.

The teachers in the Negro elementary school were not as well trained and were not as highly rated by the County Supervisor, who had rated them as B teachers, whereas he had rated the teachers in the white schools as A teachers.

So, we submit, that the palpable, perhaps the more measurable, inequalities in this case are of a very severe and extensive nature.

The Attorney General expressed willingness in both courts below, and he expresses it in this Court to accept the decree ordering the State to equalize the schools in question.

But, as was pointed out in a portion of the Chancellor's opinion which was read here before, the Chancellor wrote:

> "This would be to say, 'Yes, your constitutional rights are being invaded, but be patient, we will see whether in time they are still being invaded.'"

The Chancellor cited Sweatt against Painter for this

proposition, and he ruled that respondents were entitled to relief immediately in the only way that relief was available, namely, by admission to the schools with the superior facilities, and he wrote:

"To postpone relief would be to deny relief,"

and the Supreme Court of Delaware affirmed on this express ground.

Justice Jackson: Is it your position that the court, finding a right being denied, has no power to take into consideration the time that it will take to correct it?

Mr. Greenberg: It is our position, Your Honor, that if constitutional rights are being denied our respondents, they are entitled to those rights as quickly as those rights can be made available; and in this case they could be made available most quickly by admission to the superior facilities -- that is, without regard to the other factors that have been discussed in the other cases.

Justice Jackson: You do not agree with the Attorney General's suggestion, then?

Mr. Greenberg: No. It is our position, for example, that if the State guarantees a child ten years of education, and the child has spent approximately five of those years in inferior schools, and it is possible to give him the remaining five years on a parity with white students, that to deny him the sixth, seventh, and eighth year of equality is to

inflict an irreparable injury on him.

Those three years cannot be completely recaptured, and we feel there is no reason ~~in justice~~ or under the Fourteenth Amendment why we should not demand it.

Justice Frankfurter: When you say there is no reason in justice, of course --

Mr. Greenberg: And under the Fourteenth Amendment.

Justice Jackson: When you say that the Attorney General's plan for a gradual correction of this situation is impossible, it has to be done all at once?

Mr. Greenberg: That is our view.

First of all, it does not afford the right and, second of all, as I intend to come to in a moment, there is no showing on this record, no showing whatsoever, and both courts so found, there is no evidence that equality would occur at any time in the future.

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Justice Frankfurter: What is there in the Constitution which prevents a chancellor from taking into consideration the consequences of a decree in cases involving constitutional rights or any other rights?

Mr. Greenberg: There is nothing in the Constitution one way or another on the question.

Justice Frankfurter: He behaved the way a hancellor should behave, in the way of balancing the public interest on one side as against an immediate relief on the other?

Mr. Greenberg: But there is no showing of any public interest --

Justice Frankfurter: That is a different story. A chancellor has no business not to enforce a right which he decrees in the ordinary property case --

Mr. Greenberg: I think that if a showing had been made on that point, something of that sort might be taken into consideration.

Justice Frankfurter: I was referring to the broader question that Justice Jackson raised by referring to the considerations of the Attorney General's previous answers, the whole broad problem of relief in these cases on the assumption that rights are involved.

Mr. Greenberg: That is right, sir.

I would like to address myself to something close to that question, Your Honor. There have been questions apparently in

this case and in other cases concerning the administrative problems that might be involved in the integration which was involved in these cases. As to this case, we can only say that the decree of the Supreme Court of Delaware came down, I believe, on August the 28th, at which time both counsel for the respondents were on vacation, and before we could even return from vacation, the children who had read about the decree in the newspaper had applied to the schools and had been admitted, and there was no more administrative problem involved than admitting anybody else. I certainly heard of nothing unusual in this particular case that would indicate any serious administrative, or any administrative, difficulty.

Justice Frankfurter: Are you suggesting that on the broader issue there is no problem at all in just eliminating segregated school systems throughout the country, no problem at all?

Mr. Greenberg: Of course, there may be a problem, but in this case, there was no problem, and in fact no problem whatsoever.

Justice Frankfurter: Then there is no occasion for not doing what the Delaware court did?

Mr. Greenberg: As far as administrative problems are concerned, I see no problem.

The Attorney General's contention that the schools can be equalized within one year does not take several factors into

account. The first one is, how the Wilmington School Board, which is not a party to this case, and which would have to equalize the Howard School in question, can be compelled to equalize the Howard School, since it is not a party to the case. The court of chancery and the Supreme Court of Delaware both know that they could not order the Wilmington Board to do anything to which it was not a party. And the Attorney General in his petition for certiorari and also in his argument nowhere indicated how Delaware courts of equity could administer the type of decree which he said that they should have handed down, as both the court of chancery, which would have to administer such a decree, and the Supreme Court of Delaware have ruled that they cannot engage in the sort of business which he wants them to become involved in.

I read from page 57 of the thin blue book, at the end:

". . . It is difficult to see how a court of equity could effectively supervise and direct the expenditure of state funds in a matter committed to the sound administrative discretion of the school authorities."

The Chancellor wrote similarly that he did not see how he could order the state to put into effect the equalization which the Attorney General suggests this Court should order the state to do.

A reference to the pages of the record to which the Attorney General referred for his assertion that equality will

occur sometime in the future does not reveal that there is any likelihood of equality at all in the future. Both courts below found no likelihood of future equality.

The Court of Chancery wrote on page 352 of this thick white book:

"I do not see how the plans mentioned will remove all the objections to the present arrangement."

And on page 353:

"I conclude that the State's future plans do not operate to prevent the granting of relief to these plaintiffs . . ."

And on page 356, he indicated that the same considerations applied to the elementary school cases. I was talking about the high school cases in the other two.

The Supreme Court of Delaware likewise noted that the Attorney General had proffered no evidence whatsoever of future equalization, and he noted that claims of equality would have to be judged when made in the future. That is on page 58 of the thin blue book.

So the Attorney General's request for a decree ordering equalization is based upon a factual premise that such equalization will occur at some ascertainable time in the future, and it is nowhere supported in the record in either of the opinions of the courts below.

The Chief Justice: You mean to say that the record does

not show about the construction of the new high school, costing a million and a quarter dollars, that the Attorney General referred to?

Mr. Greenberg: Yes, Your Honor. It showed that a new high school is being constructed. That high school is 30 miles south of where respondents live, in the high school case, and it nowhere indicates what effect that high school will have upon the future education of respondents.

The Chief Justice: Does it consider the additions at Howard, and how they would be ready for use next September? Is that in the record, or is the Attorney General speaking out of the record?

Mr. Greenberg: There is a stipulation, Your Honor, which I will quote in full, and I think it will thoroughly answer your question. The stipulation is on page 36 of the clipped-in portion of the thin blue book, and Item 3 of that stipulation states:

> "The present schedule of the Wilmington Board of Education calls for a transfer of grades seven, eight and nine of the Howard High School to the Bancroft School and the closing down of the Carver School at the beginning of the school year in September, 1953."

The Chief Justice: Is there anything about the additional facilities at Howard? We were told that there quite a bit of it, and that that would be ready in September.

Mr. Greenberg: I think, in justice to the Attorney General, I can take the petition for certiorari and refer to every record reference that he gives. On page 5 of his petition for certiorari, speaking of future equalization, he refers first to pages R-36 and 57, which are in the clipped-in portion of this thin blue book. On page R-36 is Item 3, which we just read. On page 57, there is the statement that the court held, "As to the Howard-Carver buildings, plans have been approved for the transfer of the junior high school pupils at Howard to another junior high school, for the enlargement of the Howard building, with additional equipment, and for the closing of Carver and the transfer of its pupils to Howard. It is said that all these changes are expected to be completed by September, 1953, and that they will completely equalize the Howard facilities. It is also shown that plans are under way to build a modern high school for Negroes at Middletown, New Castle County."

That is our item. I might say that this nowhere takes into account contemplated future changes at the Claymont School, and the record indicates a very vast expansion program is under way there.

He then refers in that same paragraph to page 57, which I read, and then he refers to page A-312, which is page 312 of the thick white book. George Miller, who was State Superintendent of Education, stated:

"The construction program in New Castle County provides for a four-year high school in Middletown which is under way now, and we are just waiting for materials until that is completed."

But it nowhere indicates what effect that will have. This is 30 miles south of where respondents live. It in no way indicates what effect that will have on respondents' education.

He then in the elementary school case refers to pages R-59 to 62, where it is stated that until recently the white elementary school was favored in the receipt of public funds, and that that inequality has been eliminated, and on page 62, there is the statement that, speaking of the fact that the inequality of funds had been eliminated, "the burden was clearly upon the defendants to show the extent to which the remedial legislation had improved conditions or would improve them in the near future. This the defendants failed to do. It is natural to suppose that with the equality of funds any substantial disparities will shortly be eliminated, but we must take the record as it was made below."

And that only refers to the equalization of teachers in the two schools. It does not refer to any other disparities.

As Mr. Redding indicated, Your Honor, it is our contention in this case that from the Attorney General's position in this case and from the express provision in the opinion of the Supreme Court of Delaware, this litigation is open to re-segre-

gate those plaintiffs at any time that the physical facilities, they believe, may become equalized.

Now, if the physical facilities were all that were involved in this case, it would be our contention that this merely might be another unfortunate burden that these respondents have to bear solely because of their race. But where the record proves that the injury from which the right flows will exist in segregated schools so long as segregated schools exist, we submit that this Court should recognize these facts and assure the respondents' admission permanently.

Justice Black: Do you say that the record shows that? What are you depending upon? The findings?

Mr. Greenberg: We are depending upon the findings and the evidence upon which the findings were made.

Justice Black: Do you take the position that the findings affect the matter generally, or only in Delaware?

Mr. Greenberg: The findings expressly referred to Delaware, Your Honor, in our Delaware society. As to the other states, I have read the record in some of these other states, and there is similar evidence. But speaking of the Delaware case, the findings refer to Delaware specifically, and indeed, by our witnesses there was a very heavy emphasis upon the fact that these Delaware children were examined by one of America's most eminent psychiatrists, and by psychologists. An ex head of the Delaware Psychological Association testified for us.

The head of the Sociology Department of the University of Delaware testified for us. A professor of education at the University of Delaware testified for us. It was all to the effect that in Delaware society, this is the effect.

Justice Black: Is that what you are limiting this part of your argument to, that on the basis of cases of this kind and the findings of fact based on oral testimony it may be expected, under the "separate but equal" doctrine to show that there is an inferiority in educational opportunity in one community where there might not be in another?

Mr. Greenberg: Yes, your Honor, that is part of what you might call a three-prong attack. But that is only one part of it. We also contend, of course, that the classification is entirely unreasonable, but we are urging all the reasons we can for affirmance of the judgment below. And that is one of the reasons.

So as I said, in the doctrine announced in the case of Helvering v. Lerner Stores, which is in our brief at page 11, we urge these additional reasons for affirmance of the judgment below.

We urge again that this Court recognize the unreasonableness of the classification involved in this case, and also that this Court adopt as its own the factual finding of the Chancellor that state-imposed segregation in Delaware society injures the Negro child.

Justice Frankfurter: How can we do that? The Supreme Court says that we are not going to review that. That means that we must take the testimony of Dr. Fredric Wertham, for whom I have a great respect, and say that his testimony, his

appraisal and his judgment are like mathematical pronouncements, and there they are.

Mr. Greenberg: Well, your Honor, there are several things involved. It is a very full and completely uncontradicted record. Secondly, there was a thorough review of the Chancellor.

Justice Frankfurter: But the testimony of a witness is subject to intrinsic limitations and qualifications and illuminations. The mere fact that a man is not contradicted does not mean that what he says is so.

Mr. Greenberg: As far as that is concerned, the Chancellor --

Justice Frankfurter: If a man says three yards, and I have measured it, and it is three yards, there it is. But if a man tells you the inside of your brain and mine, and how we function, that is not a measurement, and there you are.

Mr. Greenberg: That is true, your Honor. But it is our contention that as far as the value to be placed upon the facts, the trial judge was able to see and hear the witness, and that is certainly in the record. The Chancellor saw him. Now, as far as the record is concerned, your Honors are as free to review that record as the Supreme Court of Delaware. They can not recapture the mood and the word of the witness, either, and this bears on a constitutional right.

Justice Frankfurter: I do not know about that. They

are dealing with Delaware conditions. They are dealing with situations that they know about. It makes a lot of difference, whether you have two so-called minority children in a group of 20 or two out of 50 or 10 out of 40. Those are all local conditions, as to which the Supreme Court of Delaware has some knowledge, having lived there and thought about these things.

Mr. Greenberg: All we can say is that whatever consideration was given to the matter by the Delaware court, all added up to the fact that segregation injured these children. And as far as what I assume your Honor is referring to, I assume your Honor is referring to what other counsel has referred to, the untoward effects of the abolition of segregation.

Justice Frankfurter: I am not referring to anything, except that we are here in a domain which I do not yet regard as science in the sense of mathematical certainty. This is all opinion evidence.

Mr. Greenberg: That is true, your Honor.

Justice Frankfurter: I do not mean that I disrespect it. I simply know its character. It can be a very different thing from, as I say, things that are weighed and measured and are fungible. We are dealing here with very subtle things, very subtle testimony.

Mr. Greenberg: Our only answer to that is that to the extent that it did receive a review below, and to the extent

km4 that the Chancellor was able to view these witnesses, and to the extent that the cross-examination affected their testimony, and to the extent that the Supreme Court of Delaware felt that the abolition of segregation would have any untoward effect, none of that weakens this testimony at all, because in fact segregation was abolished as far as these particular children were concerned, and they are now attending the schools.

Justice Frankfurter: I do not mean to raise the question of testimony. All I am saying is that I do not have a record such as I would have if I merely had the Chancellor's findings or if the Supreme Court had said, "We agree with the Chancellor."

Mr. Greenberg: I agree that if more people had reviewed this --

Justice Frankfurter: Not more; the very simple fact, the fact that the Supreme Court said, inasmuch as we deem this immaterial, we do not review it, and therefore we have merely a finding of an intermediate court, as to which I know not what the highest court of Delaware would have said if they had reviewed it.

Justice Black: Did you say that the children are now attending those schools?

Mr. Greenberg: That is right, sir. They registered from the beginning of the semester. I thought I mentioned that the

decree --

Justice Black: I thought the argument was that they could not get in, that it would disrupt the schools.

Mr. Greenberg: The Attorney General of Delaware applied for a stay of execution, but it was not granted to him. One of the reasons was that he applied too late, and another reason was that to grant the stay would be inconsistent with the mandate.

And so for the reasons that Mr. Redding has submitted, and particularly for those reasons, because we feel that our respondents' rights can be more fully protected and more permanently protected in that way, we urge that this Court affirm the judgment below, and assure that the respondents' stay in the schools to which they have been admitted and which they are now attending will be one unharassed by future litigation, and attempts to segregate them once more.

(Whereupon, at 3:50 p.m., the argument was concluded.)